



TC06683

Appeal number: TC/2017/09022

EXCISE DUTY – restoration of a vehicle – whether a decision not to restore a vehicle which has been used to carry goods liable to forfeiture was unreasonable – consideration of whether or not the refusal would cause exceptional financial hardship – no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALEKSANDER DUL

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE TONY BEARE
MRS SHEILA CHEESMAN JP**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on
15 August 2018**

The Appellant represented himself

**Mr Christopher Harper, instructed by the Cash Forfeiture and Condemnation
Legal Team of the Home Office, for the Respondent**

DECISION

Introduction

5 1. This decision relates to an appeal by the Appellant against a review conclusion
contained in a letter from the Respondent to the Appellant dated 24 October 2017.
The letter confirmed the Respondent's original decision of 4 September 2017 to
refuse to restore the Appellant's Mercedes Sprinter van (the "Vehicle") that was
10 seized at Dover Docks on 13 July 2017. The Vehicle was seized because it was
carrying beer and cigarettes which, in the view of the Officer who stopped the
Vehicle, were being carried for commercial purposes and not for the occupants' own
use. The beer and cigarettes were seized under Section 139 Customs and Excise
Management Act 1979 ("CEMA") as being liable to forfeiture under both Regulation
15 88 Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "2010
Regulations") and Section 49(1)(a)(i) CEMA. The Vehicle was seized under Section
139(1) CEMA as being liable to forfeiture under Section 141(1)(a) CEMA because it
was being used for the carriage of goods which were liable to forfeiture.

2. At the time of the seizure, the Appellant was given a notice which informed him
that he could challenge the legality of the seizure in the Magistrates Court by serving
20 a notice of claim to the Respondent within 1 month of the seizure.

3. The Appellant did not serve any such notice on the Respondent. Instead, he
wrote to the Respondent on 13 July 2017 asking for the Vehicle to be restored. On 4
September 2017, the Respondent wrote to the Appellant refusing the request for
restoration and, on 17 September 2017, the Appellant asked for a review of that
25 decision. Mr David Harris, an Officer of the Respondent, notified the Appellant of
the review conclusion in a letter of 24 October 2017 and the present appeal against
that review conclusion was made pursuant to Section 16(1) of the Finance Act 1994
(the "FA 1994") on 20 November 2017.

The relevant law

30 4. Before summarizing the terms of Mr Harris's letter, we think that it would be
helpful to describe the provisions of the legislation and the case law authorities which,
in each case, we believe to be relevant to the present appeal. These are as follows:

35 (a) Under Regulation 13 of the 2010 Regulations, where excise goods
already released for consumption in another EU Member State are held
for commercial purposes in the UK in order to be delivered or used in the
UK, the excise duty point is the time when the goods are first so held and
the person liable to pay the duty is, inter alia, the person holding the
goods;

40 (b) Regulation 13 of the 2010 Regulations provides that excise goods
are held for commercial purposes if, inter alia, they are held by a private
individual and are not for that individual's own use and acquired in, and
transported to the UK from, another EU Member state by that individual;

5 (c) Regulation 13 of the 2010 Regulations also sets out the factors
which are to be taken into account in determining whether the excise
goods in question are for the individual’s own use and expressly defines
the term “own use” as including use as a personal gift but not including
“the transfer of the goods to another person for money or money’s worth
(including any reimbursement of expenses incurred in connection with
obtaining them)”. Just pausing there, we note that this definition means
that a person who is carrying goods which are intended for use by another
person who is going to reimburse the first-mentioned person for the cost
of the goods is deemed not to be carrying those goods for his or her “own
use” and is therefore deemed to be carrying those goods for “commercial
purposes”. In this respect, Regulation 13 of the 2010 Regulations mirrors
the language used in Article 33 of European Council Directive
2008/118/EEC, the directive pursuant to which the 2010 Regulations are
enacted in the UK;

20 (d) Regulation 88 of the 2010 Regulations provides that, if, in relation
to excise goods that are liable to duty that has not been paid, there is a
contravention of any provision of the 2010 Regulations or any condition
or restriction imposed by or under the 2010 Regulations, the goods in
question are liable to forfeiture;

25 (e) Section 49(1) CEMA provides that, where, except as provided by or
under the “Customs and Excise Acts 1979” (as defined in Section 1
CEMA), any imported goods, being chargeable on their importation with
customs or excise duty, are, without payment of that duty, unshipped in
any port, those goods shall be liable to forfeiture;

30 (f) Section 139(1) CEMA provides that “[any] thing liable to forfeiture
under the customs and excise Acts may be seized or detained by any
officer or constable or any member of Her Majesty’s armed forces or
coastguard”;

(g) Section 141 CEMA provides that, where any thing has become
liable to forfeiture under the customs and excise Acts, any vehicle which
has been used for the carriage of that thing at the time when it was so
liable shall also be liable to forfeiture;

35 (h) Section 139(6) of the CEMA provides that, in relation to any thing
seized as liable to forfeiture under the customs and excise Acts, Schedule
3 CEMA shall have effect;

40 (i) under paragraph 3 of that Schedule, any person claiming that any
thing seized as liable to forfeiture is not so liable has 1 month from the
date of the notice of the seizure (or, if no such notice is served has been
served on him or her, 1 month from the date of the seizure) in which to
give notice of that claim to the Respondent;

(j) under paragraph 5 of that Schedule, in the absence of a notice of a
claim under paragraph 3, the seized goods “shall be deemed to have been
duly condemned as forfeited”;

5 (k) it has been held in a number of decisions by the higher courts that, once goods are deemed to have been duly condemned as forfeited, then, in any future proceedings before the First-tier Tribunal, the fact or facts on which the forfeiture was based must be deemed to be true and there is no room for the First-tier Tribunal to find facts that are contrary to that fact or those facts – see the Court of Appeal decisions in *Gora v CCE* [2003] EWCA Civ 525; [2004] QB 93 (“*Gora*”) and *The Commissioners for Her Majesty’s Revenue and Customs v Lawrence Jones and Joan Jones* [2011] EWCA Civ 824 (“*Jones*”) and the decision of Morgan J in the Upper Tribunal in *Her Majesty’s Revenue and Customs v European Brand Trading Limited* [2014] UKUT 0226 (TCC) (“*EBL*”);

10 (l) however, it is still open to the First-tier Tribunal to find the relevant facts other than those on which the condemnation is based – see *EBL* at paragraphs [63], [67] and [69];

15 (m) Section 152(b) CEMA provides that the Respondent may, as it sees fit, restore, subject to such conditions (if any) as it thinks proper, any thing forfeited or seized under the customs and excise Acts;

20 (n) Sections 14(1)(d) and 14(2) FA 1994 and paragraph 2(r) Schedule 5 FA 1994 provide that a person in relation to whom, or on whose application, a decision under Section 152(b) CEMA has been made may require the Respondent to review that decision;

(o) Section 16(1) of the FA 1994 provides that the person who required the review may then appeal against the review decision;

25 (p) Section 16(4) FA 1994 provides that, in relation to any such appeal, the powers of the First-tier Tribunal are confined to a power, where the First-tier Tribunal is satisfied that that the decision could not reasonably have been arrived at, to direct that the decision is to cease to have effect from such time as the First-tier Tribunal may determine, to require the Respondent to conduct, in accordance with the directions of the First-tier Tribunal, a further review of the original decision or, in the case of a decision which has already been acted on or taken effect, to declare the decision to have been unreasonable and to give directions to the Respondent as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future;

35 (q) the above provisions make it clear that the decision as to whether or not to restore a forfeited asset is a matter for the Respondent to determine at its discretion and that the First-tier Tribunal can disturb that decision only if it is unreasonable in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 K.B. 223 (*Wednesbury*”). In other words, the First-tier Tribunal is not permitted to consider the relevant facts de novo and determine whether or not it agrees with the conclusion that the Respondent has reached. Instead, it needs to consider whether, in reaching that conclusion, the Respondent has reached a conclusion that no

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reasonable person could have reached - for example, by taking into account matters that it ought not to have taken into account or disregarding matters that it ought to have taken into account. The Respondent's decision cannot be impugned simply because the First-tier Tribunal or some other person might have reached a different conclusion on the relevant facts as properly understood. Moreover, if the First-tier Tribunal finds that the Respondent has acted unreasonably in the *Wednesbury* sense as described above, then it cannot substitute its own conclusion for the impugned decision. It can direct only that a further review takes place in accordance with its directions;

(r) it is for the Appellant to prove that the decision which is challenged is unreasonable in the sense described in *Wednesbury*, and not for the Respondent to prove that the opposite is true – see the decision of the First-tier Tribunal (Judge Huddleston and John Adrian FCA) in *McGeown International Limited v Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 407 (TC) at paragraphs [45] and [46]; and

(s) in considering the reasonableness or otherwise of the Respondent's decision in relation to restoration, the First-tier Tribunal should take into account the deemed facts (as described in paragraph 4(k) above) and, to the extent that they are not inconsistent with the deemed facts, the actual facts, as found by the First-tier Tribunal, in the latter case, even if those actual facts were unknown to the decision-maker at the time when the decision was made – see paragraphs [38] and [39] of the judgment of Pill LJ (with which Chadwick LJ agreed) in *Gora*.

The review conclusions

5. In his review letter, Mr Harris gave the following reasons for reaching his conclusion that the earlier decision to refuse to restore the Vehicle to the Appellant was correct:

(a) the policy of the Respondent is that private vehicles used for the improper importation or transportation of excise goods should not normally be restored. The policy is intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. However, vehicles may be restored at the discretion of the Respondent, subject to such conditions as the Respondent may see fit;

(b) it was for him to determine whether the earlier decision not to restore should be confirmed, varied or withdrawn. In doing so, the policy described above should be applied firmly but not rigidly, so as to allow an exercise of discretion on a case by case basis;

(c) he had considered the earlier decision afresh on its own merits, including the circumstances of the events on the date of the seizure and the related evidence in order to decide if any mitigating or exceptional circumstances existed that should be taken into account and he had

examined all of the representations and other material that were available to the Respondent both before and after the time of the earlier decision;

5 (d) however, he had not considered the legality or the correctness of the seizure itself because any challenge to that should have been made before the Magistrates Court within 1 month of the date of the seizure or notice of the seizure;

10 (e) the person best-placed to explain the importation of such a large amount of beer was the Appellant and, on the night when the seizure had occurred, the Appellant had chosen to terminate the interview with the Respondent's Officer. In the view of Mr Harris, "if this was a legitimate importation there was no need to leave the interview unfinished" and "as you have not claimed that the excise goods were to be passed on to others on a 'not for profit' reimbursement basis I have concluded that they were held for profit and the vehicle should not normally be restored";

15 (f) in the Court of Appeal decision in *Lindsay v The Commissioners for Her Majesty's Revenue and Customs* [2002] 1 WLR 1766 ("*Lindsay*"), it was made clear that, given the damage to the public interest caused by smuggling, it is both acceptable and proportionate that the vehicles of those who smuggle for profit should be seized and not restored although
20 cases of exceptional hardship must always be given due consideration;

(g) he had paid particular attention to the degree of hardship caused by the loss of the Vehicle in this case. A degree of hardship is to be expected when a vehicle is seized and it is only in a case of exceptional hardship that the general policy of not restoring the vehicle will be disapplied. The
25 Appellant had chosen to become involved in smuggling and, if the consequences of that decision were to put the Appellant in a difficult financial position, then the Appellant should have thought of that before choosing to embark on that course of action; and

30 (h) in this case, the hardship suffered by the Appellant as a result of the forfeiture of the Vehicle was not exceptional and therefore there was no reason not to apply the Respondent's general policy of refusing to restore private vehicles involved in smuggling. The application of that policy in this case involved treating the Appellant no more harshly or leniently than anyone else in similar circumstances, with the result that his decision was
35 both reasonable and proportionate.

The witness evidence

6. At the hearing, we heard evidence from both the Appellant and Mr Harris.

7. The Appellant gave the following evidence:

40 (a) he reiterated the point which he had made in his earlier correspondence, which was that the beer and cigarettes that were in the Vehicle at the time when he was stopped were for the personal use of himself and his two companions in the Vehicle at the time. He and they

had merely misunderstood the allowances which each of them had in that regard;

5 (b) he explained that the reason why he had terminated the interview on the night in question was that he had by then been driving for a considerable period of time and that he could see no point in perpetuating the interview as he was being asked the same questions again and again;

10 (c) he pointed out that, if he had intended to smuggle the goods in question, he would not have used such an expensive vehicle and he would have been carrying far more goods – the value of the Vehicle relative to the value of the goods meant that it made no sense to smuggle such a small amount of goods in the Vehicle;

15 (d) he admitted that he had signed the interview notes as an accurate record of the interview and also that the amount of beer in the Vehicle at the time of seizure was the 80 cases recorded by the Respondent, as opposed to the 55 cases that he had said he was carrying when he was interviewed by the Respondent's Officer;

20 (e) he pointed out that, in addition to his debt to Santander UK Plc of £14,211.11 as at 18 January 2018, the evidence for which he had provided to the Respondent before the hearing on 15 February 2018, he had other debts as well and he provided evidence of those other debts in documents which he presented to us at the hearing. Those debts were a debt of £538.06 as at 5 June 2018 to Royal Bank of Scotland, a debt of £9,871.97 as at 19 June 2018 to Santander UK Plc, a credit card debt of £2,829.82 as at 31 March 2018 to Barclaycard and a credit card debt of £3197.70 as at 25 24 May 2018 to Santander UK Plc. The statements in relation to the credit card debts showed that, over the period since the forfeiture of the Vehicle, the Appellant had been making small but regular payments to reduce the relevant debts;

30 (f) he explained that, since the forfeiture, he had been working for a friend as a cross-border courier, on a self-employed basis, using a vehicle provided by his friend. In other words, he was doing exactly the same work as he was doing at the time of the forfeiture but simply using someone else's vehicle and not his own. That work occupied him for a variable amount of time but, broadly speaking, it was generally for two or 35 three weeks each month because he got one or two jobs a month and each of those jobs lasted for a period of around one or two weeks;

40 (g) he explained that his savings amounted to approximately £1,000 and that he had been earning approximately £2,000 per month over the 18 month period when he had been using the Vehicle for the purposes of his cross-border courier business but that he was now earning approximately £1,200 per month using his friend's vehicle;

(h) he conceded that he and his family were able to get by on their reduced resources but that the loss of income which he was suffering as a result of not having the Vehicle was making life difficult financially;

(i) he said that he had not until now sought further work from anyone other than his friend because he was still hoping to recover the Vehicle and resume working independently; and

5 (j) he confirmed that he was still with his partner, Ms Monika Szewczyk, and that, as their younger child would be starting school this September, Ms Szewczyk would be in a position to look for work at that point.

8. Mr Harris gave the following evidence:

(a) he has been a review officer of the Respondent since 2001;

10 (b) in reaching his review conclusion, he had not taken into account any of the debts referred to in paragraph 7(e) above because the statement evidencing the first-mentioned debt had been sent to the Respondent only on 15 February 2018 (which was after the date of his review conclusion letter) and the statements evidencing the remaining debts had been
15 presented to him only at the hearing;

(c) however, he pointed out that it was important to bear in mind that the test to be applied in a case such as this was not whether the appellant in question would suffer hardship by reason of the non-restoration of his or her vehicle – after all, the whole point of the regime was that hardship
20 should be suffered in order to deter the activity in question – but rather whether the appellant in question would suffer exceptional hardship;

(d) whilst exceptional hardship would not always be financial in nature – for example, in circumstances where the vehicle in question was needed to take a dependent of the vehicle owner to hospital regularly, a refusal to restore the vehicle might give rise to exceptional hardship of a non-financial nature – in this case, the relevant question was whether the Appellant would suffer exceptional financial hardship if the Vehicle was not restored;

30 (e) in that context, it was not enough for the Appellant to provide evidence of his liabilities because there were other factors that were relevant to the financial position of the Appellant such as the level of savings held by the Appellant and other members of his household and the amounts that he and other members of his household either were actually earning or had the potential to earn; and

35 (f) finally, he said that, after hearing and reading the further evidence which had been provided to him since the date when he reached his review conclusion, he did not think that it would have changed that conclusion although he would not want to be definitive on that conclusion without giving the additional evidence some further thought.

40 Discussion

9. The conclusions which we have drawn in relation to this matter are as follows.

10. We would start by observing that, as is mentioned in paragraphs 4(p) to 4(r) above, we are not entitled to consider the position afresh ourselves and thus to reach a view on whether or not we agree with the conclusion set out in the review conclusion letter of 24 October 2017. Instead, we are confined to considering whether the
5 decision of the Respondent set out in the review conclusion letter is unreasonable in the sense described in *Wednesbury* – ie so unreasonable that no reasonable person could have reached it, for example, because the Respondent took into account matters that it ought not to have taken into account or disregarded matters that it ought to have taken into account. Moreover, the onus is on the Appellant to establish that the
10 decision set out in the review conclusion letter is unreasonable in the sense described in *Wednesbury*. It is not for the Respondent to establish that the decision set out in the review conclusion letter is reasonable in that sense. It goes without saying that these two points mean that there is a high hurdle for the Appellant to surmount in order to make a successful challenge to the Respondent’s decision to refuse restoration.

11. We also observe that, for the reason set out in paragraph 4(s) above, in reaching our determination as to whether the conclusion set out in the review conclusion letter is reasonable in the sense described in *Wednesbury*, we are not permitted to re-examine the question of whether, when the Vehicle was seized, the goods in the
15 Vehicle were being held for the own use of the occupants of the Vehicle or for some other purpose. As the Appellant chose not to challenge the seizure before the Magistrates Court, the seizure is deemed to be valid and the facts on which the seizure was based – ie the fact that the goods in question were not intended for the own use of
20 the occupants of the Vehicle – must be deemed to be true.

12. It is worth noting at this juncture that, although there is no express mention of this in the review conclusion letter, it appears from the Respondent’s statement of
25 case that, even though the goods in a vehicle at the time of the vehicle’s seizure are deemed to have been intended for a use other than own use (because that is the basis of the unchallenged seizure), the general policy of the Respondent is to agree to restore the relevant vehicle for a fee in certain circumstances, such as where the goods
30 in question are intended for onward supply on a ‘not for profit’ reimbursement basis. (As mentioned in paragraph 4(c) above, where the goods in question are intended to be onward supplied for consideration in money or money’s worth, albeit on a ‘not for profit’ basis, that falls outside the definition of “own use” in Regulation 13 of the
35 2010 Regulations and is therefore still a ground for seizure but it appears that the Respondent’s general policy in such cases is then to agree to restore the relevant vehicle for a fee). We believe that that general policy explains the two paragraphs on page 4 of the review conclusion letter starting:

“The person best placed to explain the importation...”.

13. In those paragraphs, Mr Harris is explaining why the effect of the Respondent’s
40 general policy in this case is that restoration should be refused but it would perhaps have been clearer if he could have explained before setting out that conclusion that, if the goods in the Vehicle at the time of seizure had been intended for onward supply on a ‘not for profit’ reimbursement basis, then the Respondent’s general policy would have been to restore the Vehicle for a fee instead of refusing to restore the Vehicle.

The passages which Mr Harris then goes on to cite from *Lindsay* relate solely to circumstances where the person whose vehicle has been seized was involved in smuggling, as opposed to simply having the intention of supplying the relevant goods to others on a 'not for profit' basis. That distinction was central to the decision in Lindsay and could have emerged more clearly from the review conclusion letter.

14. Be that as it may, taking all of the above into account, we believe that the questions which we need to determine in this case are as follows:

(a) first, given that the Respondent's general policy is to restore, for a fee, a Vehicle which, at the time of seizure, is carrying goods which are intended for onward supply on a 'not for profit' basis, was the conclusion drawn by Mr Harris in the paragraphs of his review conclusion letter described in paragraphs 12 and 13 above (to the effect that, in this case, the goods in the Vehicle were intended for sale at a profit) unreasonable in the sense described in *Wednesbury*?

(b) secondly, if that conclusion was not unreasonable in that sense, is the Respondent's general policy - of refusing restoration of a vehicle in a case where the goods in the vehicle at the time of seizure are intended for sale at a profit unless the appellant can establish that non-restoration will lead to exceptional hardship - unreasonable in the sense described in *Wednesbury*? and

(c) thirdly, if that policy is not unreasonable in that sense, was the conclusion drawn by Mr Harris in this instance that this was not a case of exceptional hardship - with the result that the Vehicle should not be restored to the Appellant - unreasonable in the sense described in *Wednesbury*?

15. As noted in paragraph 4(s) above, pursuant to the decision of the Court of Appeal in *Gora*, we are required to assess the reasonableness of the conclusions reached by Mr Harris which are referred to in paragraphs 14(a) and 14(c) above not only by reference to the facts that were known to Mr Harris at the time of his decision but also by reference to the facts that have subsequently emerged before and at the hearing.

16. We consider each of these questions in turn below.

Was the conclusion that the goods were intended for sale at a profit reasonable?

17. In his review conclusion letter, Mr Harris based his conclusion that the goods in the Vehicle were intended for sale at a profit to some extent on the adverse inference which he drew from the fact that the Appellant chose to terminate the interview early without explaining the purposes for which his cargo was held. The Appellant has explained in his written submissions before the hearing and at the hearing itself that this was because he was tired after his long journey and that he was being asked the same question repeatedly by the Respondent's Officer.

18. If the fact that the Appellant chose to terminate the interview early had been the only evidence on which Mr Harris had based his conclusion that the Appellant intended to sell the beer at a profit, then the explanation proffered by the Appellant for truncating the interview might have given us pause for thought.

5 19. However, it is clear from pages 3 and 4 of the review conclusion letter that, in addition to the early termination of the interview, Mr Harris was taking into account in reaching his conclusion “the circumstances of the events on the date of seizure and the related evidence” (see the foot of page 3 of the review conclusion letter) and “all
10 the circumstances surrounding the seizure” (see the top of page 4 of the review conclusion letter).

20. And when one looks at those circumstances, as recorded in the transcript of the interview, which the Appellant concedes that he signed as being accurate, one can see that the reason for the repeated questions was that the Appellant was giving inconsistent accounts of the quantity of beer within the Vehicle. He first said that he
15 had about 300 litres and then, almost immediately, went on to say that he had about 55 cases (which amounts to much more than that – closer to 500 litres). In fact, the Appellant now concedes that there were 80 cases, just shy of 1,000 litres, in the Vehicle at the time. That is a considerable quantity of beer given the average annual
20 figure for beer consumption in the UK and is difficult to justify as being for personal use, even after taking into account the fact that there were three occupants of the Vehicle at the time of seizure. Yet the Appellant has consistently maintained that that is what the beer was for. Even after taking into account that there were three occupants of the Vehicle and not just the Appellant, it strains credulity to suggest that all of the beer was for the personal use of those occupants.

25 21. We believe that the Appellant’s credibility has been seriously damaged by the inconsistencies in his answers and by the volume of beer that he was transporting. Given those facts, Mr Harris was, in our view, entitled to conclude that the purpose of the Appellant was to sell the beer at a profit. The Appellant might have prevented Mr Harris from drawing that conclusion if he had stayed to finish the interview and had in
30 some way restored his credibility and provided a plausible explanation for the volume of beer that he was transporting. Instead, he chose to terminate the interview without doing either of those things.

22. In the circumstances, we do not think that the conclusion drawn by Mr Harris as to the purposes of the Appellant in relation to the beer can be said to be unreasonable,
35 in the light of the answers given by the Appellant on the night in question and his decision to terminate the interview.

Is the Respondent’s general policy reasonable?

23. For the reasons which are set out in *Lindsay* as described in paragraph 5(f) above, we do not think that the Respondent’s general policy of refusing to restore
40 vehicles which have been used for smuggling except in cases involving exceptional hardship can be said to be unreasonable. As noted by Lord Phillips MR and Judge LJ in that case, a person who chooses to use his or her vehicle to carry on smuggling

should not complain if the vehicle is then lost. The point of the policy is to deter would-be smugglers from pursuing that activity and so a measure of hardship as a result of the policy is to be expected. That is the point of the policy. So we cannot say that the general policy of requiring an appellant to prove, as a pre-condition to restoration, that he or she would suffer exceptional hardship (as opposed to just hardship) as a result of the refusal to restore the relevant vehicle is unreasonable in the sense described in *Wednesbury*.

24. One of the points made by the Appellant in his submissions before the hearing was that, in refusing to restore the Vehicle to him, the Respondent was imposing on him a disproportionate penalty, given the value of the Vehicle. This submission raises the question of whether, in refusing to restore the Vehicle to the Appellant in this case, and, in particular, in apparently failing to consider, in reaching its decision to refuse restoration, the value of the Vehicle relative to the value of the goods which the Vehicle was carrying at the time of seizure, the Respondent failed to take into account, and therefore breached:

- (a) the Appellant’s rights under article 1 of the First Protocol to the European Convention on Human Rights (“A1P1”), as applied by Section 3 of the Human Rights Act 1998; and
- (b) the doctrine of proportionality, as enshrined in European Union law, and considered in the case of *Louloudakis v Elliniko Demosio* (Case C-262/99).

(The review conclusion letter does not expressly say that Mr Harris did not take the value of the Vehicle into account in reaching his decision. Mr Harris might say that the references on page 3 of the review conclusion letter to his considering the decision “afresh on its own merits including taking into account the circumstances of the events on the date of seizure and the related evidence” and to his having examined all the representations that had been made to him in connection with the decision meant that he did take the value of the Vehicle into account in reaching his decision but the fact that the general policy of the Respondent is not to take the value of the relevant vehicle into account in deciding whether or not to restore a vehicle that has been used for smuggling and the fact that Mr Harris did not expressly refer in the review conclusion letter to his having taken the value of the Vehicle into account in reaching his decision leads us to conclude that he did not do so.)

25. The question of whether a failure to consider the value of the seized vehicle in reaching a decision in relation to restoration might contravene either the Appellant’s rights under A1P1 or the doctrine of proportionality was considered by the Court of Appeal in *Lindsay* and it is clear from paragraphs [63] and [64] of that decision that, in the view of the Court of Appeal, unless it is a case of exceptional hardship, a failure to take into account the value of the relevant vehicle where the vehicle has been used for smuggling and not simply to carry goods for onward supply on a ‘not for profit’ basis does not contravene either the Appellant’s rights under A1P1 or the doctrine of proportionality. So we are satisfied that, even if Mr Harris failed to take into account the value of the Vehicle in reaching the decision which is set out in the review

conclusion letter, that does not make the decision unreasonable in the sense described in *Wednesbury*.

Is the Respondent's conclusion that this not a case of exceptional financial hardship reasonable?

5 26. After hearing and reading the evidence which was provided to us by the Appellant at the hearing, we do not think that his circumstances are such that the conclusion by the Respondents that the financial hardship he is suffering is not exceptional can be said to be unreasonable in the sense described in *Wednesbury*.

10 27. In the first place, the drop in income which he has reported as resulting from the loss of his Vehicle is from £2,000 per month to £1,200 per month. Whilst that is material reduction, he is still able to earn a meaningful amount of income by driving for his friend. The Appellant admitted at the hearing that he is able to get by without his Vehicle – his complaint was not that he was unable to survive financially without the Vehicle but rather that the penalty which had been imposed on him was
15 disproportionate and that the absence of the Vehicle was causing him hardship. Those are two very different things. Indeed, the fact that he has been able to make credit card repayments over the period in which he has been without the Vehicle tends to support the conclusion that the Appellant can still survive financially without the Vehicle.

20 28. In addition, at the hearing, Mr Harper, on behalf of the Respondent, made the point that, in determining whether an appellant would suffer exceptional financial hardship as a result of the permanent loss of his or her vehicle, the Respondent was entitled to take into account not just the actual financial position of the appellant and the members of his or her household at the relevant time but also the potential for the appellant and the members of his or her household at the relevant time to improve
25 their financial position – for example, by taking on additional work. In this case, the Appellant testified to the fact that, hitherto, he had not sought work from sources other than his friend as he was hopeful of getting back the Vehicle and was therefore relying entirely on his friend for work in the meantime. However, it seems to us that, in addition to the income which he has been generating by working for his friend, he
30 would be able in the time left available to him after taking into account his work for his friend to look for further work from other quarters. In addition, his partner, Ms Szewczyk, will shortly be able to look for work now that their younger child is going to school, and that will increase the income in the household.

35 29. In the circumstances, whilst we can see that the Appellant has suffered meaningful financial hardship by virtue of his loss of the Vehicle, we do not think that the conclusion drawn by Mr Harris that that financial hardship is not exceptional can be said to be unreasonable in the sense described in *Wednesbury*.

Conclusion

40 30. For the above reasons, we believe that the decision set out in the review conclusion letter of 24 October 2017 cannot be said to be unreasonable in the sense described in *Wednesbury* and we therefore dismiss this appeal.

31. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**TONY BEARE
TRIBUNAL JUDGE**

RELEASE DATE: 24 AUGUST 2018

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